Chi Liung Holdings Sdn Bhd v Ng Pyak Yeow

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO J-02-94
ABU MANSOR JCA, ABDUL MALEK AND MOHD NOOR JJ
25 AUGUST 1995

Companies and Corporations — *Winding up — Liquidators — Officers of the court — Whether leave needed before action can be commenced against them — Companies Act 1965 s 305*

The applicant had rented certain premises to Rich's Supercentre Sdn Bhd ('the company'). Upon the winding up of the company, the applicant applied by way of originating motion for arrears of rent from the liquidator. However, the trial judge found that the originating motion was filed after the winding up order was made by the court. Therefore, by virtue of s 226(3) of the Companies Act 1965 ('the Act'), leave of the court was required before commencing the action. As no leave had been obtained, the action was struck out. The applicant appealed on the issue whether leave of court was indeed necessary before commencing the action since the motion was against the liquidator personally.

Held, dismissing the appeal on different grounds:

According to s 236(3) of the Act, a liquidator appointed by the court is considered an officer of the court and leave of court is needed before an action can be commenced against him. However, in this case, the application should have been made under s 305 of the Act as a claim against the liquidator in the course of winding up comes under s 305 and not s 226(3) of the Act. In any event, the applicant should have first obtained authority from the winding up judge before proceeding against the liquidator.

[Bahasa Malaysia summary

Pemohon telah menyewa premis tertentu kepada Rich's Supercentre Sdn Bhd ('syarikat itu'). Di atas penggulungan syarikat itu, pemohon telah memohon tunggakan sewa daripada penyelesai melalui usul pemula. Bagaimanapun, hakim perbicaraan mendapati bahawa usul pemula itu hanya difailkan selepas perintah penggulungan telah dibuat oleh mahkamah. Oleh itu, menurut s 226(3) Akta Syarikat 1965 ('Akta itu'), kebenaran mahkamah diperlukan sebelum tindakan itu dimulakan. Oleh kerana tiada kebenaran mahkamah diperolehi, tindakan itu telah dibatalkan. Pemohon telah membuat rayuan atas isu sama ada kebenaran mahkamah diperlukan sebelum memulakan tindakan kerana usul itu adalah terhadap penyelesai sendiri.

Diputuskan, menolak rayuan itu atas alasan yang berlainan:

Mengikut s 236(3) Akta itu, seorang penyelesai yang dilantik oleh mahkamah dianggap sebagai seorang pegawai mahkamah dan

kebenaran mahkamah diperlukan sebelum tindakan boleh diambil terhadap beliau. Bagaimanapun, di dalam kes ini, permohonan itu seharusnya dibuat di bawah s 305 Akta itu kerana sesuatu tuntutan terhadap penyelesai dalam proses penggulungan syarikat termasuk di bawah s 305 dan bukannya s 226(3) Akta itu. Walau bagaimanapun, pemohon seharusnya mendapatkan kebenaran daripada hakim mahkamah penggulungan terlebih dahulu sebelum membawa tindakan terhadap penyelesai.]

[*Editorial Note*: The applicant has applied for leave to appeal to the Federal Court.]

Notes

For cases on winding up, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 399–570.

Cases referred to

Aliprandi v Griffith Vintners Pty Ltd (in liquidation) (1991) 6 ACSR 250 (refd)

Lloyd-Owen v Bull (1936) 4 DLR 433 (folld)

Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors [1995] 2 MLJ 709 (refd)

Legislation referred to

Companies Act 1965 ss 226(3), 236(3), 305

Appeal from: Originating Motion No 25–35-93 (High Court, Johor Bahru)

GT Rajan (*GT Rajan & Co*) for the applicant.
Ong Ban Chai (*Ong Ban Chai & Co*) for the respondent.

Cur Adv Vult

Abu Mansor JCA (delivering the judgment of the court): On 21 July 1995, we struck out this appeal because we unanimously held that the appeal was not properly before us and we said we would give our reasons at a later date. We now do so.

The facts as found by the learned judge were as follows:

Background facts

Rich's Supercentre Sdn Bhd ('the company') rented the premises described as Nos 1–21, Jalan Temoh, 41400 Klang, Selangor Darul Ehsan ('the premises') from the applicant at the rate of RM30,000 per month and car-park at the rate of RM3,000 per month. A tenancy agreement was executed between the parties on 17 November 1978 for a term of three years (see exh TSC1). Under cl 3.03 the company deposited three months' rental of RM90,000 with the applicant. By way of cl 7.02 the company is given the option to purchase the premises in the event the applicant, as the landlord,

shall desire to sell the premises or any part thereof. In the purported exercise of the right under cl 7.02, the applicant vide letter dated 22 April 1989 gave the company one month's notice of option to purchase the premises. Apparently the company appeared to have not responded to the offer of option to purchase. The applicant then issued a notice dated 10 June 1989 to that effect and at the same time giving the company one month's notice to vacate the premises by 1 August 1989 for the applicant to exercise its rights under cl 7.02 of TSC1.

At the time the applicant gave the one month's notice to vacate, that is, 10 June 1989, there was already a petition filed in the High Court, Johor Bahru on 15 May 1989 by Success Sports Co for the winding up of the company vide Companies (Winding-Up) Petition No 28–67 of 1989 in which a winding-up order was subsequently made on 7 December 1989 by the High Court. The premises was surrendered to the applicant on 19 December 1989 by the liquidator (see exh TSC3). Apparently, the rents for the months of June to December were not paid and by way of notice dated 7 November 1990 (TSC3), the applicant claimed the arrears at double rents which make a total sum of RM396,000 and purported to adjust the deposit sum of RM90,000 in which case the sum due should be RM306,000. How in TSC3 the figure of RM429,000 was arrived at for all arrears due, I do not know. Be that as it may, the applicant is now claiming a sum of RM339,000 (after adjusting the deposit of RM90,000) from the liquidator as arrears of rental due to it from the company. On the other hand, the liquidator filed notice of originating motion No 25–13–92 dated 2 April 1992 against the applicant (respondent in the case) praying for refund of the deposit of RM180,000 (now agreed by Mr Ong Ban Chai should be RM90,000). The originating motion of the liquidator, as agreed, was stood down pending the disposal of this originating motion.

The learned judge found he had two issues for consideration, viz:

(1) whether the applicant is entitled to forfeit the deposit of RM90,000 towards the payment of the arrears of rental; and

(2) whether the applicant can claim for the arrears of rental from the liquidator by way of this originating motion.

When the learned judge was at the point of examining issue No 2 he held:

In any event, it would seem clear that this originating motion was filed after the winding-up order was made by the court and thus would require leave of the court under s 226(3) of the Act which reads:

> 'When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except —
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> (a) by leave of the Court; and
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> (b) in accordance with such terms as the Court imposes.'

As s 226(3) has not been complied with by the applicant, this originating motion, in my view, is not properly before the court and should therefore be struck out.

In the circumstances this originating motion is dismissed with costs.

If the reason for the dismissal of the applicant's application as found by the learned judge under s 226(3) of the Companies Act 1965 is valid, then that is the end of this matter but it does not appear to us to be so.

A At the hearing of this appeal, Mr GT Rajan for the appellant submitted that the only issue for the court to answer was whether leave of court was indeed necessary before commencing this motion since the motion is against the liquidator personally. He submitted further that it is trite law if the motion is against the company, and the company having been wound up at the motion's commencement, he conceded that leave would have to B be obtained first but he submitted, however, that since the motion was against the liquidator personally no leave was required. He submitted further that if, however, the court's decision was that leave was necessary, the court was then spared from going into the merit of this application. We adjourned to consider and to give our decision.

C At our resumed hearing, we struck off this appeal as we agreed with the learned judge that the motion, as such, in the first place, required the leave of the court before it could be brought but not for the reason found by the judge. Firstly, we read the powers of liquidator in s 236(3) of the Companies Act 1965 ('the Act'):

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> The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

We are of the view from the above provision, it is clear that a liquidator E having been appointed by the court, is an officer of the court. It goes without saying leave of the court is needed before an action is commenced against him and officers like him.

We would cite the legal position of receivers who are in the same position as officers of court. In *The Law Relating to Receivers, Managers and* F *Administrators* by Hubert Picarda at p 339, the learned author wrote:

> A receiver, in the words of Viscount Haldane LC, 'is an officer of the court put in to discharge certain duties prescribed by the order appointing him'. ... He is 'nothing more than the hand of the court'. ... for the purpose of holding the property of the litigants, ... and the possession of the receiver is simply the possession of the court.

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Then at p 373 of *Law of Receivers* by PS Atchuthen Pillai (2nd Ed) the author wrote in para 27:

> Suit without leave is contempt of court and will be dismissed. A suit against a receiver when filed without leave of court is liable to be dismissed ...
>
> H Institution of proceedings against a receiver without leave of the court is contempt of court. It is incompatible with the dignity and authority of the court to allow its officer to be summoned before any tribunal ...

As we have stated we were unanimous that the applicant should have obtained leave before making his application below, for the attitude of a I winding-up court has been that some form of leave is required. In the Privy Council case of *Lloyd-Owen v Bull* (1936) 4 DLR 433, where the liquidator of a company was required by the then company law, on an application of stockholders and contributories, to proceed against officers and stockholders of the company, to recover corporate assets wrongfully acquired by them which they had not accounted for to the corporation, the procedure

adopted was by way of petition which prayed for an order that the liquidator be directed in the company's name to take action against the respondent for the recovery of the property and assets alleged to be the property of the company and other relief.

At p 276 of the above judgment, his Lordship Lord Blanesburgh, speaking of the procedure to be adopted in this type of application, said:

> A judge in winding-up is the custodian of the interests of every class affected by the liquidation. It is his duty even if it be in a voluntary liquidation that opportunity offers to see to it that all assets of the company are brought into the winding-up. In authorizing proceedings, especially if they may or will involve some drain upon the assets, he must satisfy himself as to their probable success; where, as in the present case, they involve no possible charge on assets, he will nevertheless be careful to see that any action taken in the company's name under his authority is not vexatious or merely oppressive.

The principle in this Privy Council case was applied in the case of *Aliprandi v Griffith Vintners Pty Ltd (in liquidation)* (1991) 6 ACSR 250. The facts of the case were as follows:

> Partnership Pacific, a creditor, had H appointed as receiver and manager of the assets of a company of which the plaintiff was a contributory and former director. Later, a liquidator was appointed. Without the authority of the liquidator, the plaintiff commenced action against Partnership Pacific and against H. The liquidator was not satisfied that any indemnity for costs given by the plaintiff would be adequate. There were no funds of the company and little prospect of any coming into the liquidator's hands, in his view. Partnership Pacific and a judgment against the plaintiff for $1.3m which was stayed pending further order.
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> The plaintiff sought orders, inter alia, that he be authorized to use the name of the company as co-plaintiff, or that the liquidator ratify the commencement of the proceedings already instituted.
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> Held, making orders that the plaintiff be authorized to use the name of the company as co-plaintiff:
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> (i) The court has power to order that a creditor or contributory of a company in liquidation be authorized to use the company's name as a plaintiff.
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> (ii) The proper approach of the court to such an application requires it to consider the probable success of a contemplated action to see that any such action is not vexatious or merely oppressive. The case must have some arguable foundation.
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> (iii) Following an examination of the claims advanced for the plaintiff, there was no arguable case against Partnership Pacific. H was appointed as receiver and manager as the agent of the company and not of Partnership Pacific which was not responsible for any breaches of duty by the receiver.
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> (iv) There was an arguable case that there were breaches of duty committed by H as receiver and the plaintiff should be authorized to commence proceedings with the company as co-plaintiff against him alone.
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> (v) There was no legitimate basis on which a costs order could be made against the liquidator in those proceedings.
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> (vi) As a condition of the order made in the plaintiff's favour, the plaintiff must provide to the liquidator a deed of indemnity for any costs and

A pay $5,000 on account of the costs of the winding up incidental to the contemplated proceedings.

We set out this authority above as illustrating the procedure adopted by the approving judge in the application before granting leave.

The applicant's application in our view should have properly been an B application because of a possible wrongdoing by a liquidator and, therefore, under s 305 of the Act:

> Power of Court to assess damages against delinquent officers, etc.
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> (1) If in the course of winding up it appears that any person who has taken part in the formation or promotion of the company or any part or C present liquidator or officer has misapplied or retained or become liable or accountable for any money or property of the company or been guilty of any misfeasance or breach of trust or duty in relation to the company, the Court may on the application of the liquidator or of any creditor or contributory examine into the conduct of that person liquidator or officer and compel him to repay or restore the money or D property or any thereof with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication retainer misfeasance or breach of trust or duty as the Court thinks just.
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> (2) This section shall extend and apply to and in respect of the receipt of any money or property by any officer of the company during the two E years preceding the commencement of the winding up whether by way of salary or otherwise appearing to the Court to be unfair or unjust to other members of the company.
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> (3) This section shall have effect notwithstanding that the offence is one for which the offender is criminally liable.

F Our Federal Court in *Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors* [1995] 2 MLJ 709 considered s 305 of the Act and at p 721 said:

> With respect to the misfeasance proceedings under s 305 of the Act, Encik Sethu submitted the proceedings could only continue in the course of G winding up. It could not proceed independently. Counsel submitted that under the section, the court had summary jurisdiction over the directors or officers of the company for the misconduct.

The court quoted s 305(1) of the Act as above.

The Federal Court continued:

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> It would be correct to say that our s 305(1) is based on s 333 of the English Companies Act 1948, but the words 'or duty' were taken from s 305 of the Companies Act 1961 of the State of Victoria (*Re Kie Hock Shipping (1971) Pte Ltd* [1985] 1 MLJ 411). However, it is settled law that s 333 of the English Act did not create any new or distinct rights but only provided I summary remedy. In *Re B Johnson & Co (Builders) Ltd* [1955] Ch 643 at p 648; [1955] 2 All ER 775 at p 781; [1955] 3 WLR 269 at p 277, Evershed MR observed that s 333 was merely a procedural section and did not establish a new tort. In *Cavendish Bentinck v Fenn* (1887) 12 App Cas 652 at p 669, Lord Macnaghten said:
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> > 'Section 165 of the Act of 1862 [the misfeasance section, now s 333 of the Act of 1948] has often come under discussion, and it has been

settled, and I think rightly settled, that that section creates no new offence, and that it gives no new rights, but only provides a summary and efficient remedy in respect of rights which apart from that section might have been vindicated either at law or in equity. It has also been settled that the misfeasance spoken of in that section is not misfeasance in the abstract, but misfeasance in the nature of a breach of trust resulting in a loss to the company.' A B

In *Re Etic Ltd* [1928] Ch 861 at p 875, Maugham J stated that the section:

'... is not applicable to all cases in which the company has a right of action against an officer of the company. It is limited to cases where there has been something in the nature of a breach of duty by an officer of the company as such which has caused pecuniary loss to the company. Breach of duty of course would include a misfeasance or a breach of trust in the stricter sense, and the section will apply to a true case of misapplication of money or property of the company, or a case where there has been retention of money or property which the officer was bound to have paid or returned to the company.' C

From the pleadings, we were satisfied that the appellant in bringing her claim under s 305 of the Act was merely seeking a summary remedy in the course of the winding up of the company and that her claim was within the scope of the section. D

We respectively agree with the learned judge below that the applicant's application should be so dismissed but for a different reason than that given by the learned judge. We think that s 226(3) of the Act only applies where the action is against the company but, as submitted by counsel for the applicant, in this case the action was against the liquidator and we have held, that s 305 of the Act applies. E

While we agree that the applicant may proceed against the liquidator, we are, however, firmly of the view the procedure is that the applicant must have first obtained authority from the winding-up judge before proceeding against the liquidator and not, as was done here, proceeded independently to prevent unnecessary and wasteful litigation. The approach the learned judge should take is as given in the Privy Council case of *Lloyd-Owen v Bull* cited above. As advised in that case, he has to obtain authority from a judge below who will act liberally but must satisfy himself as to the probable success of this application and he has to give an assurance to the sanctioning judge that his action is not vexatious or merely oppressive. The court, in exercising their supervision, will ensure that no wasteful litigation is brought against liquidators and the like. Since the applicant had not obtained the authority to proceed, we struck off this appeal with no order as to costs. F G H

Mohd Noor J: Saya bersetuju sepenuhnya dengan isi kandungan penghakiman ini.

Abdul Malek J: Saya bersetuju sepenuhnya dengan isi kandungan penghakiman ini. I

Appeal dismissed.

Reported by Azra Azman